

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT FLEMING,

Petitioner,

-against-

THE ATTORNEY GENERAL OF THE
STATE OF NEW YORK,

Respondent.

20-CV-6026 (LLS)

ORDER

LOUIS L. STANTON, United States District Judge:

Petitioner, currently incarcerated in Five Points Correctional Facility and acting *pro se*, filed this petition for a writ of *habeas corpus* under 28 U.S.C. § 2254 challenging his state narcotics conviction under indictment number 0032/2009. The Court directed Petitioner to show cause why his § 2254 petition should not be denied as time-barred (ECF No. 7), and Petitioner responded (ECF No. 8). By order and judgment entered on December 1, 2020, the Court dismissed the petition as time-barred.¹ (ECF Nos. 12-13.)

Before the 30-day deadline for filing a notice of appeal expired, on December 28, 2020, the Court received Petitioner's motion for an extension of time to appeal (ECF No. 15), but he did not file a notice of appeal. On January 19, 2021, the Court received another motion for

¹ Petitioner also sought compassionate release based on the risk of contracting Covid-19 in prison, by filing letters in both this action, and in his pending § 2254 *habeas* proceedings challenging his two murder convictions, for which he is serving 50 years' to life imprisonment, *Fleming v. Noeth*, 1:17-CV-9104, 1 (LGS) (DCF) (S.D.N.Y.) (R & R pending). This Court declined to recharacterize Petitioner's initial letter challenging the conditions of his confinement as a § 2254 petition, noting that nothing in the Court's order prevented Petitioner from filing such an application. (ECF No. 7.) But in the face of Petitioner's repeated requests for compassionate release, which could not be addressed in the context of a challenge to Petitioner's 2009 narcotics conviction, the Court directed the Clerk of Court to open his letter (ECF No. 14) as a new action seeking *habeas* relief based on the conditions of his confinement. *See Fleming v. Attorney General of the State of New York*, ECF 1:20-CV-11130, 1 (CM) (S.D.N.Y.) (pending).

extension of time to appeal. (ECF No. 18.) Petitioner also filed additional letters seeking compassionate release based on the Covid-19 pandemic (ECF Nos. 17-19), even though this action was closed and the Court has opened a separate action to address Petitioner's request for such relief, *Fleming v. The Attorney General of the State of New York*, ECF 1:20-CV-11130, 1 (CM) (S.D.N.Y.)

For the following reasons, the Court grants Petitioner's motions for an extension of time to file a notice of appeal, and directs him to file a notice of appeal within fifteen days.

DISCUSSION

Under Fed. R. App. P. 4(a)(1)(A), a notice of appeal in a civil case must be filed within thirty days after entry of judgment. The district court may extend the time to file a notice of appeal, however, if a petitioner files a motion within thirty days after expiration of the time to file notice of appeal, and shows excusable neglect or good cause for failing to timely file. *See* Fed. R. App. P. 4(a)(5)(A).

Petitioner's motions for an extension of time to file notice of appeal were both filed within thirty days after expiration of the time to file a notice of appeal. Although Petitioner's reasons for failing to submit a timely notice of appeal are not entirely clear, given his concerns about the handling of the Covid-19 pandemic in prison, it seems plausible that this impeded his ability to file a notice of appeal and establishes good cause for failing to do so. Because Petitioner did not submit a notice of appeal with his motion, the Court grants his motion for an extension of time to file a notice of appeal and directs Petitioner to file a notice of appeal within fifteen days of the date of this order.

CONCLUSION

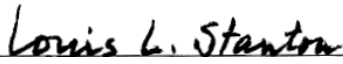
The Clerk of Court is directed to mail a copy of this order to Petitioner and note service on the docket. The Court grants Petitioner's motions for an extension of time to file a notice of

appeal. (ECF Nos. 15, 18.) Petitioner is directed to submit a notice of appeal within fifteen days of the date of this order. A notice of appeal form is attached to this order.

The Court directs Petitioner not to file any further requests for compassionate release in this action because his request for such relief is being addressed in *Fleming*, ECF 1:20-CV-11130, 1 (CM) (S.D.N.Y.).

SO ORDERED.

Dated: April 9, 2021
New York, New York



Louis L. Stanton
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(List the full name(s) of the plaintiff(s)/petitioner(s).)

____CV____ () ()

-against-

NOTICE OF APPEAL

(List the full name(s) of the defendant(s)/respondent(s).)

Notice is hereby given that the following parties: _____

(list the names of all parties who are filing an appeal)

in the above-named case appeal to the United States Court of Appeals for the Second Circuit

from the ☐ judgment ☐ order entered on: _____
(date that judgment or order was entered on docket)

that: _____

(If the appeal is from an order, provide a brief description above of the decision in the order.)

Dated

Signature*

Name (Last, First, MI)

Address

City

State

Zip Code

Telephone Number

E-mail Address (if available)

* Each party filing the appeal must date and sign the Notice of Appeal and provide his or her mailing address and telephone number, EXCEPT that a signer of a pro se notice of appeal may sign for his or her spouse and minor children if they are parties to the case. Fed. R. App. P. 3(c)(2). Attach additional sheets of paper as necessary.



**United States District Court
Southern District of New York**

**HOW TO APPEAL YOUR CASE TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT**

If you disagree with a judgment or final order of the district court, you may appeal to the United States Court of Appeals for the Second Circuit. To start this process, file a "Notice of Appeal" with this Court's Pro Se Intake Unit.

You must file your notice of appeal in this Court within 30 days after the judgment or order that you wish to appeal is entered on the Court's docket, or, if the United States or its officer or agency is a party, within 60 days after entry of the judgment or order. If you are unable to file your notice of appeal within the required time, you may make a motion for extension of time, but you must do so within 60 days from the date of entry of the judgment, or within 90 days if the United States or its officer or agency is a party, and you must show excusable neglect or good cause for your inability to file the notice of appeal by the deadline.

Please note that the notice of appeal is a *one-page* document containing your name, a description of the final order or judgment (or part thereof) being appealed, and the name of the court to which the appeal is taken (the Second Circuit) – *it does not* include your reasons or grounds for the appeal. Once your appeal is processed by the district court, your notice of appeal will be sent to the Court of Appeals and a Court of Appeals docket number will be assigned to your case. At that point, all further questions regarding your appeal must be directed to that court.

The filing fee for a notice of appeal is \$505 payable in cash, by bank check, certified check, or money order, to "Clerk of Court, S.D.N.Y." *No personal checks are accepted.* If you are unable to pay the \$505 filing fee, complete the "Motion to Proceed *in Forma Pauperis* on Appeal" form and submit it with your notice of appeal to the Pro Se Intake Unit. If the district court denies your motion to proceed *in forma pauperis* on appeal, or has certified under 28 U.S.C. § 1915(a)(3) that an appeal would not be taken in good faith, you may file a motion in the Court of Appeals for leave to appeal *in forma pauperis*, but you must do so within 30 days after service of the district court order that stated that you could not proceed *in forma pauperis* on appeal.

For additional issues regarding the time for filing a notice of appeal, see Federal Rule of Appellate Procedure 4(a). There are many other steps to beginning and proceeding with your appeal, but they are governed by the rules of the Second Circuit Court of Appeals and the Federal Rules of Appellate Procedure. For more information, visit the Second Circuit Court of Appeals website at <http://www.ca2.uscourts.gov/>.

**THE DANIEL PATRICK MOYNIHAN
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NEW YORK, NY 10007-1312**

**THE CHARLES L. BRIEANT, JR.
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